140-761
140-101

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 358.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM BALL AND HENRY M. DANIEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED APRIL 27, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 358.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

WILLIAM BALL AND HENRY M. DANIEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

INDEX.

	Original.	Print
Writ of error (original)	1	1
Writ of error (copy)	2	1
Proof of service of citation	3	2
Citation	4	2
Complaint	6	3
Proof of service of summons	9	4
Summons	10	4
Answer	13	5
Demurrer to answer	34	15
Motion to strike out part of answer	36	16
Order overruling demurrer and denying motion to strike out	38	16
Opinion of Judge Deady	40	17
Judgment	42	20
Clerk's certificate	43	20

1 In the Supreme Court of the United States.

THE UNITED STATES
vs.
WILLIAM BALL AND HENRY M. DANIEL. } No. 1350.

Writ of error. (*Original.*)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the honorable Matthew P. Deady, one of you, between The United States, plaintiff and and plaintiff in error, and William Ball and Henry M. Daniel, defendants and defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. eighteen hundred and eighty-eight, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this February 15, 1888.

[SEAL.] R. H. LAMSON,
Clerk of the Circuit Court of the United States
for the District of Oregon.
By R. B. LAMSON,
Deputy Clerk.

(Indorsed:) In the Supreme Court of the United States. The United States *vs.* William Ball and Henry M. Daniel. Writ of error.

2 In the Supreme Court of the United States.

THE UNITED STATES
vs.
WILLIAM BALL AND HENRY M. DANIEL. } No. 1350.

Writ of error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Judges of the circuit court of the United States for the district of Oregon, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before the honor-

able Matthew P. Deady, one of you, between the United States, plaintiff and plaintiff in error, and William Ball and Henry M. Daniel, defendants and defendants in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by complaint doth appear; and we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, and in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October, A. D. 1888, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being then and there inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States of America should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this February 15, 1888.

[Seal of U. S. circuit court.]

R. H. LAMSON,
Clerk of the circuit court of the United States
for the District of Oregon.
By R. B. LAMSON,
Deputy Clerk.

(Indorsed:) 1350. In the Supreme Court of the United States. The United States vs. William Ball and Henry M. Daniel. Writ of error.

3 DISTRICT OF OREGON, *ss:*

I certify that on the 24th day of February, 1888, at North Yamhill, Yamhill County, in said district, I duly served the within citation on writ of error upon the therein named William Ball and Henry M. Daniel by delivering to each one personally a true copy of said citation on writ of error duly certified to by me as U. S. marshal.

JOHN MYERS,
United States Marshal.
By CHAS. N. WAIT,
Deputy.

4 UNITED STATES OF AMERICA,
District of Oregon, ss:

To William Ball and Henry M. Daniel, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday in October, A. D. eighteen hundred and eighty-eight, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Oregon, wherein The United States is plaintiff in error and you are defendants in error, to show cause, if any there be, why

the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this February 16, 1888.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

(Indorsed:) No. 1350. U. S. circuit court, district of Oregon. The United States vs. William Ball and Henry M. Daniel. Citation on writ of error, Feb. 25, 1888. R. H. Lamson, Clerk.

5 In the circuit court of the United States for the district of Oregon, October term, 1886.

Be it remembered, that on the 24th day of January, 1887, there was duly filed in the circuit court of the United States for the district of Oregon, a complaint in words and figures as follows, to wit:

6 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES,
vs.
WILLIAM BALL AND HENRY M. DANIEL. } Complaint.

Comes the plaintiff above named, by Lewis L. McArthur, the attorney thereof for the district of Oregon, and complaining of the above-named defendants allege the following facts constituting its cause of action:

That on the first day of January, A. D. 1881, and on divers other days between said day and the first day of February, A. D. 1884, one John W. Green, unlawfully and wilfully and without the consent or license of the plaintiff, entered upon the northeast quarter of the northeast quarter and the southeast quarter of the northwest quarter of section thirty in township two south of range five west of the Willamette meridian in Yamhill County, State and district of Oregon, the same being then and there public lands of the United States, and did then and there unlawfully and wrongfully, and with intent to dispose of the same, cut and remove and cause and procure to be cut and removed therefrom a large amount, to wit, eight hundred and forty thousand feet of timber then and there growing and being on said land, and did then and there cut and manufacture said timber, so cut and removed as aforesaid, then and there being the property of the plaintiff into saw-logs, and did then and there transport and remove and cause to be transported and removed all of said saw-logs, so unlawfully cut and removed as aforesaid, to a certain saw-mill owned and operated by the defendants in Yamhill County, Oregon.

7 That the said defendants then and there, well knowing that the said saw-logs were the property of the plaintiff and had been manufactured from timber cut and removed from the lands of the plaintiff as aforesaid, did then and there wrongfully and unlawfully take possession of the same and cut, saw, and manufacture all of said logs into boards and other lumber of the aggregate value of six thousand seven hundred and twenty dollars, and the said defendants then and there, well knowing that

the said boards and other lumber were the property of the plaintiff as aforesaid, wrongfully and unlawfully took possession of the whole thereof and converted the same to their (the defendants') own use, to the damage of the plaintiff in the sum of six thousand seven hundred and twenty dollars.

Wherefore the plaintiff prays judgment against the defendants for the full sum of six thousand seven hundred and twenty dollars and for the costs and disbursements of this action.

LEWIS L. MCARTHUR,
United States Attorney.

DISTRICT OF OREGON, *ss:*

I, Lewis L. McArthur, being sworn, depose and say that the foregoing complaint is true as I verily believe.

LEWIS L. MCARTHUR.

Subscribed and sworn to before me this Jan. 24, 1887.

R. H. LAMSON,
Clerk.

(Endorsed:) Filed Jan. 24, 1887. R. H. Lamson, clerk.

8 And afterwards, to wit, on the 24th day of January, 1887, there was issued out of said court a summons in words and figures as follows, to wit:

9 DISTRICT OF OREGON, *ss:*

I certify that on the 7th day of Feb., 1887, at La Fayette, Yamhill County, in said district, I duly served the within summons upon the therein named William Ball and Henry M. Daniel, by delivering to them, personally, a true copy of said writ, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled action, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal.
By P. A. MARQUAM, Jr.,
Deputy.

10 In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

THE UNITED STATES
vs.
WILLIAM BALL AND HENRY M. DANIEL. } No. 1350.

Summons.

The President of the United States to William Ball and Henry M. Daniel, the above-named defendant, greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Portland, in said district, and answer the complaint filed against you in the above-entitled action within ten days from the date of

the service of this summons upon you, if served within the county of Multnomah, in said district, or if served within any other county of said district then within thirty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the full sum of six thousand seven hundred and twenty dollars, and for the costs and disbursements of this action.

11 And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Portland, in said district this 24th day of January, 1887.

Seal of U. S. Circuit Court.]

R. H. LAMSON,
Clerk.
By R. B. LAMSON,
Deputy.

(Indorsed:) No. 1350. In the circuit court of the United States for the district of Oregon. United States vs. William Ball and Henry M. Daniel. Summons. Returned and filed Feb. 8, 1887. R. H. Lamson, clerk.

12 And afterwards, to wit, on the 21st day of March, 1887, there was duly filed in said court, an answer in words and figures as follows, to wit:

13 In the circuit court of the United States for the district of Oregon

THE UNITED STATES
vs.
WILLIAM BALL AND
HENRY M. DANIEL.

Comes now the said defendants, Wm. Ball and Henry M. Daniels, by their attorney, H. Hurley, and answering the plaintiff's complaint herein, deny:

That on the 1st day of January, A. D. 1881, or on divers other days, or any other day or days between the said first day of January, 1881, and the 1st day of February, A. D. 1884, or at any other time, one John W. Green, unlawfully or willfully, or without the consent or license of the plaintiff, entered upon the lands described in the complaint herein, or any part thereof, and deny that the said lands were

then or there public lands of the United States, or that any part thereof was such public land. [1]

Deny that said John W. Green did then or there or at any time or place unlawfully or wrongfully or with intent dispose of the same, cut or remove or cause or procure to be cut or removed, eight hundred and forty thousand feet, or any number of feet, or amount of timber, then or there or at all growing or being on said land, or did then or there cut or manufacture said timber so cut or removed, or any part thereof, into saw logs.

And deny, that the said timber or saw logs were then or there or at all the property of the plaintiff, or that the said John W. Green did then or there or at all transport or remove, or cause to be transported or removed, all or any of said saw logs to a certain saw-mill owned or operated by the defendants, [2] or either of them, in Yamhill County, Oregon, or at any place.

Deny that the said saw logs, or any of them, were the property of the plaintiff or were or had been manufactured from timber cut or removed from the lands of the plaintiff, or that defendants, or either of them, well knew or at all knew that the said saw logs were the property of the plaintiff or were manufactured from timber cut or removed from the lands of the plaintiff, or that the defendants, or either of them, did then or there or at any time or place wrongfully or unlawfully take possession of the same, or any part thereof, or

cut, saw, or manufacture all or
said logs into boards or
other lumber, or that the same
was of the aggregate value of
six thousand seven hundred and
twenty dollars, or any value
whatever.

Deny that the said defendants [3]
or either of them well knew or
at all knew that the said boards
or other lumber were the
property of the plaintiff or that
the defendants so knowing, wrongfully
or unlawfully or at all took
possession of the whole or any part
thereof, or converted the same or
any of it to their own use.
Deny that the said boards
or other lumber were the property
of the plaintiff, or that any part
thereof was so the property of the
plaintiff. And deny that the
plaintiff was or is damaged by
the alleged conversion of said
boards or other lumber in the
sum of six thousand seven hundred
and twenty dollars, or any sum
whatever. And the defendants deny
that they or either of them did
ever at any time take possession
of, use, or convert to their use
any saw-logs or timber cut or
removed from the lands described
in the complaint herein excepting
the amount, and in the manner
in defendants, further and separate [4]
answer.
And the defendants for a further and
answer and defense to plaintiff's
cause of action allege and aver the
following facts to wit, that on the day
of Nov. 1880, and prior thereto the following
described land was unoccupied public
land of the United States to wit, the north
half of the northeast quarter and the east
half of the northwest quarter of section
thirty in T. 3, S., R. 5, W., in Yamhill County,
State of Oregon, and containing one hundred
and sixty acres, and subject to homestead
entry. That the lands described in plaintiff's

complaint are a part of the lands above described.

That at said time the said John Green, being a citizen of the United States and the head of a family and over twenty-one years of age and had never borne arms against the United States or given aid or comfort to its enemies, duly filed with the register and receiver at Oregon City, Oregon, his application for a homestead of said lands above described, under and by virtue of the acts of Congress commonly called the homestead law, and the acts amendatory thereof, and on the day of November A. D. 1880, the said John Green, for the purpose [5] of making said land a homestead under said act, entered upon, and took possession of the same, and on the day of 1880, for the purpose of securing said land the said John Green made before and filed with said land officers his affidavit required by said act to be made by homestead claimants to the effect that he was the head of a family and over twenty-one years of age, and a citizen of the United States, and that his application was made for his exclusive use and benefit, and that his entry was made for the purpose of actual settlement and cultivation and not either directly or indirectly for the use or benefit of any other person, and that he had not heretofore had the benefit of said act, and at the same time paid to said officers a fee of ten dollars provided by said act, and thereupon said officers permitted him to enter said land as a homestead and entered the same on the maps, plats, and records of their offices. That on the day of January, A. D. 1886, the said John Green made and filed with said register a notice of his intention to make his final proof of his said homestead, and thereupon [6] said register caused to be published and posted, the notice required by said act, of the time and place of making final proof of said homestead, and the names of witnesses, and at the time mentioned in said notice, to wit, on the day of January, A. D. 1886, the said John Green appeared before said officers of said land office

at Oregon City, Oregon, and proceeded to introduce and submit his evidence required by said act, of his residence upon and cultivation of said land as a homestead for five consecutive years from the date of said entry, and said officers after fully considering said testimony of final proof did find and adjudge, that the said John Green was at the time he made application for said land as such homestead a citizen of the United States, over twenty-one years of age, and the head of a family, and entitled to said land as a homestead. That he entered upon said land on the day of Nov., 1880, as such claimant and continued to reside upon and cultivate the same for five consecutive years from said date in strict accordance with all the provisions of said act. That he had [7] never bourne arms against the United States or given aid or comfort to its enemies. That no part of his said homestead had been sold, contracted for or alienated. That said entry was made for his exclusive use and benefit, and for the purpose of actual settlement and cultivation, and not either directly nor indirectly for the use or benefit of any other person, and that he had not heretofore had the benefit of said act. And that he had in all respects complied with all the provisions of said act so to entitle him to a patent to said land, and that he was entitled to a patent to said land as a homestead claimant. And said officers thereupon made and delivered to him a patent certificate showing that he had complied with the provisions of said act and had made final proof and was entitled to a patent on the presentation to the Commissioner of the General Land Office said final certificate, and said Green is now the owner of said land and the holder of said certificate That the only timber or logs which these defendants ever bought of the said [8] John Green, to wit, 239,680 feet, was cut from off said homestead by said John Green during the time he

was occupying it as such homestead and was cut and made from trees which the said Green had cut from off said land for the purpose of clearing the same for agriculture. That said 239,810 feet of logs are part of those described in plaintiff's complaint and that the value is or was but fifteen cents per thousand feet or $36.00 in the aggregate

And the defendants for a further and separate answer and defense alleges that on the day of , 1880, and prior thereto said lands described in plaintiff's complaint were unoccupied public lands of the United States, and subject to homestead entry under and by virtue of the act of Congress passed May 20th, 1862, commonly called the homestead law and the acts amendatory thereof. That at said time said John Green, being a citizen of the United States, and the head of a family, and over twenty-one years of age, and had never bourne arms against the United States or given aid and comfort to its enemies, under and by virtue of said act of Congress, and in accordance with the rules and regulations of the General Land Office of the United States in regard to homestead entries, duly filed his application in the land office at Oregon City, Oregon, for a homestead of one hundred and sixty acres of said unoccupied public lands of the United States, which said one hundred and sixty acres included the lands described in the complaint [10]

and was a part of said homestead, and on the first day of November, A. D. 1880, the said John Green entered upon and took possession of said land as such homestead, under and by virtue of said act of Congress. That thereafter, to wit, on the day of , 1880, the said John Green made before and filed with the register and receiver at the land office at Oregon City, Oregon, his affidavit required by said act, to the effect that he was a citizen of the United States, over twenty-one years of age, and the head of a family,

and that his said application was made
for his exclusive use and benefit, and
that his entry was made for the purpose
of actual settlement and cultivation,
and not either directly or indirectly
for the use or benefit of any other person,
and that he had not heretofore had the
benefit of said act; and said John Green
thereupon paid to said officers the fee
of ten dollars due thereon as provided
by said act, and said officers then per-
mitted him to enter said land as a
homestead, and entered the same
upon the maps, and plats, and records
of said office and issued to him [11]
a receipt for said ten dollars. That
said John Green resided continuously
upon said one hundred and sixty acres
of land so homesteaded, and including
said land described in the complaint
from said term of entry till the
day of 1886, being five years,
during all of which time he continued
to reside upon and cutivate and
improve said land in accordance
with the provisions of said act as
a homestead, and during said time
he cut off the timber then growing
on said land two hundred and
thirty-nine thousand six hundred
and eighty feet of saw logs, and sold the
same to these defendants and no more. That said
timber out of which said saw logs
were made was cut down on said
land by said Green in good faith for the purpose
of clearing said land and rendering
it fit for cultivation and agriculture,
and that said timber so cut was only
for the value of fifteen cents per
thousand, or of the aggregate value of
$36.00. That said John Green within
two years after the expiration of the
five years residence and cultivation [12]
appeared before the said register and
receiver, and by two credible witnesses
made his final proof of residence and
cultivation under said act and in
accordance with its provisions, and
also made the affidavit required by
him by said act in support of said
final proof, which proof and affidavit

was received by said officers, examined and approved, and declared by them to be satisfactory, and filed as such final proof, and said officers thereupon made and delivered under their hands a certificate for a patent to said lands, showing and attesting that he had in all things fully complied with the requirements of said acts, and had made his final proof, and was entitled to a patent for said lands on the presentation of said certificate to the Commissioner of the General Land Office. That said 239,680 feet of saw logs are a part of the logs named in the complaint, and the only logs or timber that the defendants ever bought from off said land described in the complaint. And the defendants further allege that during the time [13]
the said John Green was in possession of said land as a homestead claimant he made improvements thereon, consisting of a house, barn and outhouses, and fences, of the value of eight hundred dollars, and done and performed everything and act required of him in regard to said homestead, by said act of Congress, so as to entitle him to a patent to the same. [14]
And the said defendants for a further and separate answer and defense herein allege the following facts:
That on the day of Nov., 1880, John Green went upon and took possession of the following described tract of land, to wit: The north half of the northeast quarter and the east half of the northwest quarter of section thirty, T. 3 S., R. 5 W. and in Yamhill County, State of Oregon, as a claimant thereof under and by virtue of the provisions of the acts of Congress of May 20th, 1862, commonly called the homestead law, and duly made his application to the officers (register and receiver) of the U. S. land

office at Oregon City, Oregon, therefor. That at and during said time the said tract of land was unoccupied public land of the United States and [15] subject to entry at said land office under and by virtue of the said act of Congress. That at said time said John Green was a citizen of the United States, the head of a family, over the age of twenty-one years, and had never bourne arms against the United States nor given aid or comfort to its enemies, and the said John Green made before and filed with the said officers of the land office his affidavit stating the facts last above recited, and the further facts, to wit, that said entry was made and said land was taken for his own exclusive use and benefit, and not directly or indirectly for the use or benefit of any other person, and was for the purpose of actual settlement and cultivation. That the said John Green thereupon paid said [16 and 17] officers of the land office the fee of ten dollars required by said act of Congress, and they thereupon permitted said John Green to enter said tract of land under the aforesaid homestead law and duly entered and marked said entry as such homestead claim upon the maps and plats and records of the said office. That on the day of 1886, the said John Green made his final proof of settlement, residence, and cultivation of the said

tract of land as a homestead,
and filed his affidavit
required by said act, and
the said officers issued
to him a final or patent
certificate for the said
homestead.
That during all of the
time herein named, to wit,
from the day of Nov., 1880,
until the 11th day of Jan., 1886, [18 and 19]
the said John Green
resided upon and cultivated
the said tract of land,
and claimed and represent-
ed to these def'ts that he
was residing upon and
cultivating the same in
good faith in strict
accordance with the
provisions of said homestead
law, and that he was
cutting and removing the
timber therefrom for the
purpose of cultivation of
the same and for no
other purpose, and these
def'ts, from the acts and
conduct of said John
Green, believed the said
statements and representa-
tions of the said Green,
and that he was comply-
ing in all respects with
the said homestead law
and was cutting and
removing the said timber
therefrom for the purposes
of cultivation only, and [20]
that it was necessary to
cut and remove the said
timber for the said purpose
did buy from the said
John Green, of the said
timber so cut, two hundred
and thirty-nine thousand
six hundred and eighty feet
of the timber growing on
said tract of land, and
no more, which is the
timber referred to in the
complaint, and the only

timber bought by these
def'ts of the timber growing
on said land, and that
these defendants in the
purchase thereof acted in
good faith, believing that
the same was removed
only for the purpose of
cultivation and was necessari-
ly removed
for that purpose;
and the defts allege
that the said timber so
bought by these defts
was of the value of fifteen
cents per thousand, or |21|
thirty-six dollars in the
aggregate, and was of no
other or greater value;
wherefore, defendants prays judgment
that this action be dismissed.

H. HURLEY,
Attorney for Defts.

STATE OF OREGON,
County of Yamhill:

I, Wm. Ball, being
duly sworn, depose and say that
I am one of the defendants above
named, and that I believe the above
answer to be true.

WM. BALL.

Subscribed and
sworn to before
me this 17th day of
March, 1887.

[SEAL.]

H. HURLEY,
Notary Public for
Yamhill, Co., Oregon.

(Endorsed:) Filed Mar. 21, 1887. R. H. Lamson, clerk. [22]

And afterwards, to wit, on the 15th day of June, 1887, there was duly filed in said court a demurrer to answer in words and figures as follows, to wit:

In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
WILLIAM BALL AND HENRY M. DANIEL. } No. 1350.

Demurrer, &c.

Comes now the pl'ff and demurs to the first separate answer and further defense of the defendants, and for cause thereof alleges that the facts there-

in set forth do not constitute a defense to the plff.'s cause of action nor to any part thereof.

And of this demurrer the plff. prays the judgment of the court.

L. L. McARTHUR,
U. S. Att'y.

(Endorsed:) Filed June 15, 1887. R. H. Lamson, clerk.

35 And afterwards, to wit, on the 15th day of June, 1887, there was duly filed in said court a motion to strike out parts of answer in words and figures as follows, to wit:

36 In the circuit court of the United States for the district of Oregon

THE UNITED STATES
vs.
WM. BALL AND HENRY M. DANIEL. } No. 1350.

Motion to strike, &c.

Comes now the plaintiff and moves the court to strike from the third separate answer and further defense of the def'ts all that part thereof commencing with the word "and," on line 4 of page 20, and ending with the word "purpose," in line 3 of page 21, for the reason that the same is frivolous and irrelevant.

And of this motion the pl'ff prays the judgment of the court.

L. L. McARTHUR,
U. S. Att'y.

(Endorsed:) Filed June 15, 1887. R. H. Lamson, clerk.

37 And afterwards, to wit, on Friday, the 5th day of August, 1887, the same being the 57th judicial day of the regular April term of said court. Present: The honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

38 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
WILLIAM BALL AND HENRY M. DANIEL. } No. 1350. August 5, 1887.

This cause was heard upon the demurrer to the first defense set up in the answer herein, and upon the motion to strike out parts of said answer and was argued by Mr. Lewis L. McArthur, United States attorney, and by Mr. H. Hurley, of counsel for the defendants. On consideration whereof, it is ordered that said demurrer be and the same is hereby overruled, and that said motion be and the same is hereby disallowed.

39 And afterwards, to wit, on the 5th day of August, 1887, there

was duly filed in said court an opinion by the court, in words and figures as follows, to wit:

40 U. S. circuit court, district of Oregon.

[Friday, August 5, 1887. The United States v. William Ball and Henry M. Daniel—No. 1359. Action to recover damages for conversion of timber.]

(1) *Homestead—Cutting timber thereon.*—A settler on the public lands under the homestead act, pending his residence thereon, and prior to the issue of a final certificate, is like a person in possession under an uncompleted contract of purchase, and he is not authorized to cut or remove timber therefrom, except for the purpose of preparing the land in the ordinary way for tillage, but if he does cut and remove timber therefrom for export and sale merely, and afterwards obtains a certificate from the register and receiver of his compliance with the law as such settler, the United States can not thereafter maintain an action against him for damages for cutting such timber, nor against any one to whom he may have disposed of the same for the conversion thereof.

DEADY, *J.*:

This action is brought by the United States to recover damages for the conversion of timber alleged to have been cut from the public lands in Yamhill County. It is alleged in the complaint that on January 1, 1881, and on divers days thereafter and prior to February 1, 1884, John W. Green unlawfully cut from the public lands, designated in the surveys thereof as the northeast quarter of the northeast quarter and the southeast quarter of the northwest quarter of section 30, in township two, south of range five, west of the Wallamet meridian, 840,000 feet of growing timber and made the same into sawlogs, which he removed to the defendants' sawmill in Yamhill County; that the defendants, well knowing the premises, took possession of said logs and manufactured them into lumber, which they converted to their own use, to the damage of the plaintiff in the sum of $6,720.

The answer of the defendant contains three defenses, the first of which is demurred to by the plaintiff.

In effect the defense is that in November, 1880, said Green, being qualified to enter land under the homestead act, took possession of the north half of the northeast quarter and the east half of the northwest quarter of the section aforesaid, and filed his affidavit in the proper land office as a settler thereon under said act, and paid the fees required by law; that in January, 1886, he made his final proof of compliance with said act before the proper register and receiver, who thereupon made and delivered to him a final certificate to that effect, and that he is entitled to a patent for the land; that the defendants bought 239,680 feet of logs of said Green, which were cut off said homestead during the time he occupied the same under the act, and that said logs are a part of those mentioned in the complaint, and were only worth 15 cents per 1000.

On the argument of the demurrer counsel for the plaintiff cited U. S. v. Minor (114 U. S., 233) to prove that the United States are not precluded by the proceedings before the land officers under any of the various acts for the disposition of the public lands to settlers thereon, to show that such officers have, by the falsehood or fraud of the applicant, been imposed on and

induced to give him a final certificate in a case where he was not entitled to the same, while counsel for the defendant cite and rely on Smith v. Ewing (23 Fed. Rep., 741) to prove that such certificate can not be questioned or set aside, except on a direct proceeding.

But no question of this kind arises here. Under any circumstances the certificate is at least prima facie evidence of the facts and conclusions stated therein. Neither does U. S. v. Minor countenance the idea that the certificate is subject to a collateral attack, but can only be set aside or overcome by a suit in equity instituted for that purpose.

The demurrer to the defense in this case admits the facts stated therein, the gist of which is that Green entered the premises under the homestead act, and having duly performed the subsequent conditions required by the same, and made due proof thereof, he received, in due form, a certificate to that effect from the register and receiver of the proper land office.

A settler on the public lands under the homestead act must reside on and cultivate the same for five consecutive years before he is entitled to a certificate. § 2291, R. S. In the meantime the legal title to the land and the timber thereon is in the United States, and the occupant is not entitled to cut or remove any timber therefrom, except as allowed by § 4 of the act of June 3, 1878 (20 Stat., 90), which provides in effect that an "agriculturist" on the public land—a homesteader or pre-emptioner—shall not cut or remove timber therefrom, except in the ordinary preparation of his "farm for tillage"—the manifest meaning of which is that the timber shall not be cut for the sake of the timber, but for the improvement of the land. And this implies that the cutting and tillage shall not be far apart—that the plow must follow the axe. U. S. v. Williams, 9 Saw., 377.

In this matter the United States is to be regarded as any other vendor of real property, and the settler, prior to the issue of the certificate, as a vendee of such property, in possession under an uncompleted contract of purchase.

A person who goes into possession of real property under a contract of purchase and abandons or fails to comply with the same, is liable in trespass for the profits of the land or waste committed thereon during his occupation. 1 Wash. R. P., 377; Smith v. Stewart, 6 John., 46; Bancroft v. Wardwell, 13 John., 489.

But where a conveyance has been made to the vendee in pursuance of the contract of sale, or he has become entitled, by reason of compliance with the terms of such contract, to receive one, his right in and to the land relates back to the entry under the contract, and he can not be held liable to the vendor for any profits he may have received from the land or any waste committed thereon in the meantime, although the latter were of such a character as cutting and removing timber thereon, under circumstances that would have given the vendor a right in equity to an injunction to prevent the impairment of the value of the property pending the performance of the contract; and while it might, by the failure of the vendee, be thrown back on his hands. This, in my judgment, is the relation between Green and the United States since the issue of the final certificate. He has complied with his contract of purchase, so to speak, and has established the fact to the satisfaction of the officers designated by the law for that purpose, and is entitled to a patent for the premises. The right to a patent, as to the Government, is equivalent to one issued. Stark v. Starrs, 6 Wall., 418.

But it has been suggested that the defendants, having received this tim-

ber from the settler and converted it to their own use while the contract of purchase was only partly performed and the land belonged to the United States, they are liable therefor. Under the circumstances, they certainly took the chances of Green's complying with the law and obtaining the certificate. But if the performance of his contract and the issue of the final certificate relieves Green from liability for cutting and removing this timber when and as he did, it ought to prevent the United States from maintaining an action against his vendees for converting it to their use. Before the timber was cut the United States had disposed of the land to Green, and afterwards acknowledged the performance of the conditions of sale. The plaintiff has had pay for the timber once, and has no right to claim it again from these defendants.

If A takes B's horse and sells him to C, but afterwards pays B for it, the latter can not then maintain an action against C to recover the horse or its increase.

The effect of the whole transaction between Green and the United States is to establish the right of the former to the land and the timber thereon from the time of the entry in the land office; and all those who claim under him for either the land or timber are entitled to stand in his shoes.

There is an allegation tagged on to this defense to the effect that this timber was cut for the purpose of clearing the land for "agriculture," to which no attention has been paid. There is another defense in the case founded on that fact. But this defense admits, in effect, that the timber was not cut primarily for the purpose of preparing the land for tillage, within the meaning of the proviso to section 4 of the act of 1878, but for the purpose of export and sale, and it is sustained on the theory that the subsequent compliance with the law under which the entry was made and the issue of the final certificate to that effect, makes Green in legal contemplation the owner of the land from the date of his entry, with a right to cut and dispose of the timber thereon as he saw proper. The demurrer is overruled.

The United States v. William Ball, Henry McDaniel, W. S. Powell. No. 1351. Action to recover damages for conversion of timber.

This action was brought on the same day with the foregoing one, to recover $8,250 damages for the conversion by the defendants of 2,750,000 feet of timber cut and removed by said Green from the premises aforesaid, between January, 1884, and January, 1887.

The answer of the defendants contains a defense similar to the one already considered, with the addition that the defendants, in purchasing the logs in question and manufacturing them into lumber, were acting as the directors and agents of the Yamhill Lumbering Company, a corporation formed under the laws of Oregon; and that only 846,000 feet of logs were so obtained by them—141,000 prior to January 11, 1886, when the final certificate was issued to Green, and 705,000 afterwards.

The demurrer to the defense is overruled for the reason already given.

Mr. Lewis L. McArthur for the U. S.
Mr. H. Hurley and Mr. Arthur L. Frazer for the defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge.

(Endorsed:) Filed Aug. 5, 1887. R. H. Lamson, Clerk.

41 And afterwards, to wit, on Friday, the 20th day of January, 1888, the same being the 69th judicial day of the regular October term of said court; present: the honorable Matthew P. Deady, United States district judge, presiding, the following proceedings were had in said case, to wit:

42 In the circuit court of the United States for the district of Oregon.

THE UNITED STATES
vs.
WILLIAM BALL AND HENRY M. DANIEL.
} No. 1350. January 20, 1888.

Now at this day comes the plaintiff, by Mr. Lewis L. McArthur, United States attorney, and the defendants, by Mr. Arthur L. Frazer, of counsel, and thereupon said defendants move the court for judgment upon the pleadings, and said plaintiff declining to further plead, but electing to stand upon its demurrer to and motion to strike out parts of the answer of said defendants: It is therefore considered that said plaintiff ought not to have or maintain this action and that the defendants go hence without day.

43 In the circuit court of the United States for the district of Oregon.

UNITED STATES OF AMERICA, *District of Oregon, ss:*

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify the above and foregoing to be a true, correct and complete transcript of the record and of all the proceedings had in said court, in the cause wherein The United States is the plaintiff and William Ball and Henry M. Daniel are the defendants, No. 1350, as the same appears from the files and records of said court now remaining in my custody and under my control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Portland, in said district this 17th day of March, 1888.

[SEAL.] R. H. LAMSON, *Clerk.*

(Indorsement on cover:) No. 358. The United States, plaintiff in error, *vs.* William Ball and Henry M. Daniel. Oregon, C. C. U. S. Filed April 27, 1888.

O